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No. 87-1077

In the Supreme Court of the United States

OCTOBER TERM, 1987

BRIAN MILLANG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner, a former serviceman, contends that the court of appeals misapplied *Feres* v. *United States*, 340 U.S. 135 (1950), by holding that he is barred from suing under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, to recover for an injury he sustained, while off duty, in an accident that occurred on a military base and was caused by an on-duty serviceman.

1. Petitioner, while stationed at the Marine Corps Air Station in Tustin, California, was hit by a truck driven by an on-duty military policeman. Petitioner was off duty and at a picnic on the base at the time of the accident. He sustained back injuries. Pet. App. A2-A5. Petitioner sued the government

under the FTCA and the district court rendered judgment in petitioner's favor in the amount of $1,083,896 (*id.* at A14). The district court rejected the government's contention that petitioner's claim is barred by *Feres* because, in the district court's view, the trial did not require testimony by or against superior officers and did not otherwise disrupt military discipline (*id.* at A8-A12).

The Ninth Circuit reversed (Pet. App. A15-A26). The court of appeals recognized that "*Feres* prohibits not only those suits that directly call into question military decisions, but also 'the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effect[ive]ness.' " *Id.* at A22-A23 (quoting *United States* v. *Shearer*, 473 U.S. 52, 59 (1985) (emphasis in original)). The court considered a variety of factors, including the location of the accident, whether the participants were on duty when the accident occurred, and the nature of the activities involved (Pet. App. A22 n.2), and concluded that petitioner's action involved "the type of claim that could well call military decisions into question" (*id.* at A23). The court noted specifically the critical allegation of petitioner's case — "that an on duty soldier acted negligently while discharging his responsibilities in an area subject to military control" (*ibid.*). The court also noted that petitioner has been receiving disability benefits and is entitled to such benefits for the duration of his disability, and that the government paid his medical bills (*id.* at A20).

2. The court of appeals' decision is correct and further review is not warranted. Petitioner misunderstands the standard this Court established in *Shearer*. As the court of appeals explained, *Shearer* does not require a case-by-case inquiry into the

impact of the particular litigation on military discipline and effectiveness, but instead requires determination whether the litigation of cases of particular types would, if generally permitted, undermine military discipline and effectiveness. This case presents such a claim, as the court of appeals concluded, since petitioner alleges that a military policeman negligently performed his duties on a military base, injuring another serviceman.

This Court's recent decision in *United States* v. *Johnson*, No. 85-2039 (May 18, 1987), plainly supports the decision below. The Court there reaffirmed that analysis of the *type* of claim at issue was warranted and noted that "[e]ven if military negligence is not specifically alleged in a tort action, a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission" (slip op. 9 (footnote omitted)). It also stated that the existence of generous statutory disability benefits, such as petitioner has received and is receiving, "is an independent reason why the *Feres* doctrine bars suit for service-related injuries" (slip op. 8).*

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* Petitioner's view finds no support in two of the cases on which he purports to rely. The Eleventh Circuit's decision in *Stanley* v. *United States*, 786 F.2d 1490, 1499 (1986), which petitioner cites (Pet. 15), was reversed by this Court, No. 86-393 (June 25, 1987). The Second Circuit in *Bozeman* v. *United States*, 780 F.2d 198 (1985), which petitioner also cites (Pet. 15-16), held that *Feres* barred the claim of an off-duty serviceman injured after a club on a military base served alcoholic beverages to servicemen who were obviously drunk. It thus supports the court of appeals' judgment.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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